IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 314

PACIFIC-ATLANTIC STEAMSHIP CO.,

and

E. J. LAVINO & COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

THE PETITION

of

PACIFIC-ATLANTIC STEAMSHIP CO., as owner of the American Motorship *Oregon* for exemption from or limitation of liability.

REPLY BRIEF FOR PETITIONERS.

I.

When filing the petition herein, we had not seen the First Circuit decision in *United States* v. *Woodbury*, 175 F. (2d) 854. That decision, in principle, is in accord with the Second Circuit decisions cited in the petition (p. 18)

and therefore both those Circuits are in conflict with the ruling of the court below in the present case that an unlighted vessel, knowing that she is approaching another on crossing courses, in darkness, may claim the "privilege" or "right of way" of the Starboard Hand Rule even while continuing on without showing any lights.

The respondent's brief (pp. 11-12) argues that that ruling should be affirmed, but cites no authority in support of it. *The Folkestone,* 72 Lloyd's List L. R., 240, and the *Exanthia,* 77 Lloyd's List L. R. 207 (respondent's brief, p. 12), are not in point because neither case involved the Starboard Hand Rule. In each of those cases a vessel proceeding blacked out in a wartime convoy sighted another vessel approaching from the opposite direction on a parallel course which involved no danger of collision. In each case, the approaching vessel altered course, thereby creating danger of collision, whereupon the convoy vessel immediately turned on her lights and took avoiding action. The convoy vessel was held justified in at first withholding her lights and maintaining her course and speed, not because of any "right of way" under the Starboard Hand Rule (which did not apply) but merely because she was entitled to comply with her convoy instructions so long as the respective courses involved no risk of collision.

In the case at bar, the *New Mexico* knew from the outset that she and the *Oregon* were on crossing and "collision" courses, and it is with respect to such a situation that the court below has held that the Starboard Hand Rule applied while the *New Mexico* was showing no lights.

Your petitioners do *not* contend that the wartime blackout of lights at night abrogated the Rules of Navigation (Respondent's brief, p. 11). The Special Circumstance Rule (Article 27) is as much a part of those Rules as the

Starboard Hand Rule (Articles 19, 21, 22). The crux of the matter is that the *New Mexico* had no "privilege" to maintain her course and speed while withholding her lights, if the Starboard Hand Rule did not apply.

The ruling of the court below on this point is so drastic and unsupported an interpretation of the Starboard Hand Rule that it should receive this Court's consideration before it be written into the International Rules of Navigation, which apply to all vessels upon the high seas.

II.

It is asserted in respondent's brief (p. 13), as it was asserted in the court below, that there was no "good cause" for a Discovery of the factual record of the Naval Court of Inquiry because your petitioners might have sought to identify and interview the Navy's personnel. No great imagination is necessary to appreciate the probable limitations of any enlightenment your petitioners could have obtained by seeking to reach the Navy's witnesses, but, in any event, we believe that Admiralty Rule 32 was promulgated to eliminate just that sort of thing. And we submit that any such burden upon your petitioners would be wholly contrary to the principles laid down in *Hickman* v. *Taylor*, 329 U. S. 495.

The "good cause" for the Discovery lay in the fact that the collision had resulted in the deaths of the *Oregon's* watch officer and lookout and the loss of her logs and other records, thus seriously curtailing the evidence which would otherwise have been available to your petitioners. In that situation, and in view of the character of the defense asserted by the Naval vessels, common justice required that the respondent disclose all of the evidence in its possession.

Moreover, respondent's brief (p. 14) makes no attempt to sustain the conclusion of the court below that the factual record of the Naval Court of Inquiry was "privileged". The respondent merely asserts that the Navy Department should be upheld in its desire to treat the record of such Naval investigations as "confidential" in order to "promote a freedom in testimony which would not otherwise exist." Such statements, coupled with the fact that the respondent disclosed *some* of the said record in this case, certainly justify an irresistable inference that the Navy Department wishes to treat as "confidential" any evidence unfavorable to it which it may possess as a result of its investigation.

The Navy Department is, after all, a servant of the Public, and we earnestly dispute the Navy's right to jeopardize the ends of justice, in a case of this type, on the basis that, "in the interest of effective naval administration" it wishes "to keep confidential" any of the material evidence in its possession.

III.

Respondent's efforts to portray the petition herein as raising merely questions of fact emphasize the errors of the Court below with respect to the questions presented in the petition. For instance:

(a) Respondent's brief asserts that the *New Mexico,* after sighting the *Oregon,* continued on unlighted "for the purpose of security" (p. 5). But the story set out in the official logbook of the *New Mexico* (R. 309) and repeated in the pleadings on which respondent went to trial (R. 3, 5) asserted that the *New Mexico* turned on her lights promptly

—respondent's pleading alleged "immediately"—after sighting the *Oregon* and 8 minutes before collision. Although the time interval set forth in that story was discredited by the court below, the story contained no suggestion that the *New Mexico* withheld her lights for the purpose of security. The *New Mexico's* senior watch officer admitted that he gave no thought to turning on the lights (R. 174-175), and it appears that the *New Mexico's* Supervisory Head told the Naval Board of Inquiry that the turning on of lights was overlooked until the quartermaster (a petty officer) suggested it (R. 316).

When did it first occur to respondent to argue that the *New Mexico* withheld—(i.e. *intentionally*)—her lights for the purpose of security?

(b) Respondent's brief (p. 4) asserts that the destroyers "challenged the *Oregon* with blinker light signals, but received no response." That statement overlooks (as the court below overlooked) the admissions from the destroyers that, by reason of the (unexplained) lack of a signalman on the *Sims'* bridge, no challenge was made to the *Oregon* until after she was inside the "screen" and therefore no more than about 1,000 yards from collision (R. 308, 310, 321).

In so far as those may seem to be details of fact, the willingness of the court below to deal with them on such a record as the respondent presented accentuates the grave injustice in the refusal to order that the respondent make a discovery of all of the evidence in its possession in the complete transcript of record of the Naval Court of Inquiry.

IV.

We would not have burdened the Court with this additional brief, were it not for our sincere belief that the decision of the court below rests upon serious errors, as set forth in the petition herein, which not only have resulted in injustice to your petitioners, but also are of such great importance to the maritime world that they should receive this Court's consideration.

Respectfully submitted,

Robert S. Erskine,
Leonard J. Matteson,
Counsel for Petitioners.